ANNOUNCEMENT

from the Copyright Office, Library of Congress,
101 Independence Avenue, S.E., Washington, D.C. 20559-6000

NOTICE OF PROPOSED RULEMAKING.

PUBLIC PERFORMANCE OF SOUND RECORDINGS: DEFINITION OF A SERVICE

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2000-3]

Public Performance of Sound Recordings: Definition of a Service

AGENCY: Copyright Office, Library of Congress

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Office is seeking comment on whether to amend its regulation that defines a "Service" for purposes of the statutory license governing the public performance of sound recordings by means of digital audio transmissions, in order to clarify that transmissions of a broadcast signal over a digital communications network, such as the Internet, are not exempt from copyright liability under section 114(d)(1)(A) of the Copyright Act.

DATES: Written comments are due April 17, 2000. Reply comments are due May 1, 2000.

ADDRESSES: If sent by mail, an original and ten copies of comments and reply comments should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, D.C. 20024. If hand delivered, they should be brought to: Office of the General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue, S.E., Washington, D.C. 20559-6000.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Tanya M. Sandros, Senior Attorney, Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone: (202) 707-8380. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION:

Background

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), Public Law 104-39, which created an exclusive right for copyright owners of sound recordings, subject to certain limitations, to perform publicly sound recordings by means of certain digital audio transmissions. Among the limitations on the performance was the creation of a new compulsory license for nonexempt, noninteractive, digital subscription transmissions, 17 U.S.C. 114(f), and an exemption for certain nonsubscription transmissions, 17 U.S.C. 114(d)(1)(A)(i)-(iii) (1995).

The scope of the exemption, however, has been debated since the passage of the DPRA. Broadcasters have taken the position that any broadcast, whether made over the air or over the Internet, falls within the scope of the section 114(d)(1)(A) exemptions. See Reply Comments of National Association of Broadcasters at 9-12 (dated June 20, 1997), submitted in Docket No. RM 97-1. On the other hand, copyright owners of the sound recordings have interpreted the scope of the exemption more narrowly. The Recording Industry Association of America ("RIAA"), on behalf of these copyright owners, has argued that transmissions over the Internet, generally known as webcasts, do not fall within the scope of the statutory exemptions and, instead, are subject to the copyright owners' exclusive rights under section 106(6). See, e.g., RIAA Petition and Comments of RIAA at 9-12 (dated April 28, 1997), submitted in Docket No. RM 97-1.

Congress, however, did not consider this question when it first addressed the problems associated with the emergence of digital audio technology and its effects on the music industry because, at the time, it had insufficient information on which to act. It did not understand how nonsubscription services were utilizing the Internet to bring music to the public or how to license such enterprises. Therefore, it focused the initial legislation on the digital subscription services and the interactive services that were in operation at the time.

The result was the DPRA, a law which created a licensing scheme for the subscription services and the interactive digital audio services. 17 U.S.C. 114(d)(3) and (f) (1995). It soon became apparent, however, that with the rapid proliferation of the use of the Internet as a transmission medium and the confusion surrounding the question of how the DPRA applied to some nonsubscription digital audio services, further legislation was needed to achieve the dual purposes of the DPRA.[1] Staff of the House of Representatives Comm. on the Judiciary, 105th Cong., 2d Sess., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 at 50-51 (Comm. Print, Serial No. 6, 1998).

These changes were part of the Digital Millennium Copyright Act of 1998 ("DMCA"), Public Law 105-304, which, among other things, amended sections 112 and 114 of the Copyright Act to clarify that

[1]Congress had a two-fold purpose for enacting the DPRA: "first, * * * to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used; and second, to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services." Staff of the House of Representatives Comm. on the Judiciary, 105th Cong., 2d Sess., Section-by-Section Analysis of H.R. 2281 as passed by the United States House of Representatives on August 4, 1998 at 49 (Comm. Print, Serial No. 6, 1998).

"the digital sound recording performance right applies to nonsubscription digital audio services such as webcasting" and to address the licensing issues raised by the webcasters. *Id.* at 50. Specifically, Congress amended section 114 by creating a new statutory license for nonexempt eligible nonsubscription

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transmissions (e.g., webcasting) and nonexempt transmissions by preexisting satellite digital audio radio services to perform publicly sound recordings in accordance with the terms and rates of the statutory license. 17 U.S.C. 114(f). The DMCA also amended section 114(d)(1)(A) to "delete two exemptions that were either the cause of confusion as to the application of the DPRA to certain nonsubscription services (especially webcasters) or which overlapped with other exemptions." H.R. Rep. No. 105-796, at 80 (1998).

On March 1, 2000, RIAA filed a petition for a rulemaking with the Copyright Office asking that the Office determine the scope of the section 114(d)(1)(A) exemptions. Specifically, RIAA has requested that the Office adopt a rule "clarifying that a broadcaster's transmissions of its AM or FM radio station over the Internet * * * is not exempt from copyright liability under section 114(d)(1)(A) of the Copyright Act." RIAA petition at 1 (filed March 1, 2000). RIAA states in its petition that it has attempted to negotiate voluntary agreements with broadcasters who stream their over-the-air AM or FM radio broadcast via the Internet or who have authorized a third party "aggregator" to retransmit an over-the-air radio broadcast via the Internet. It asserts that these discussions have not progressed beyond the initial stages because the parties cannot agree whether transmission of a broadcast over the Internet is subject to the digital performance right. Consequently, it has asked the Office to interpret section 114(d)(1)(A) and determine whether a broadcast transmission made via the Internet is exempt from copyright liability.

The Office agrees with RIAA that the resolution of this question has implications for both the section 112 [2] and the section 114 statutory licenses. For example, if it is ultimately decided that a broadcast transmission over the Internet falls outside the safe harbor carved out by the section 114(d)(1) exemptions, the webcaster must decide whether to make use of the statutory license under section 114(f) or whether to negotiate a private license with the copyright owners of the sound recordings. Alternatively, if the Office decides that a broadcast transmission which is streamed over the Internet is exempt under section 114(d)(1)(A), parties can avoid further negotiations over rates and terms for use of the sound recordings in those situations.

RIAA's Initial Arguments in Support of Its Petition

RIAA argues that the amendments to sections 112 and 114 support its view that broadcasters who engage in transmissions over the Internet are not exempt from copyright liability for these transmissions. First, RIAA notes that Congress had no intention of creating any new exemptions when it amended section 114(d)(1)(A), but merely sought to remove those exemptions that were the source of the confusion, either because it was unclear how the exemption applied to nonsubscription services or because the exemption was redundant. These changes were in no way intended to affect the provision that exempts nonsubscription broadcast transmissions. H.R. Rep. No. 105-796, at 80 (1998).

While RIAA does not dispute that there is a recognized exemption for over-the-air broadcast transmissions, it continues its analysis by noting that the definition of an ``eligible nonsubscription service,"—the entity which, by statute, may make use of the statutory license—specifically includes retransmissions of broadcast transmissions. Consequently, it argues that Congress never intended that broadcasts over the Internet be exempt under the provisions of section 114(d)(1)(B). Instead, Congress carved out specific exemptions for retransmissions of a nonsubscription broadcast transmission, and none of these directly address a retransmission over the Internet. 17 U.S.C. 114(d)(1)(B)(i)-(iv). Therefore, a retransmission of a nonsubscription broadcast transmission over the Internet would have to meet the requirements set forth in subsection (B) of section 114(d)(1) or be subject to the section 106(6) right of public performance.

In further support of its interpretation of the statutory license, RIAA observes that a webcaster who utilizes the section 114(d)(2) license is also eligible for a statutory license pursuant to section 112(e)(1)--a license which allows transmitting organizations to make one or more ephemeral recordings, depending upon the terms of the license. The section 112 license, however, allows only two different types of transmitting organizations to make use of the license: (1) A transmitting organization entitled to make a transmission of a sound recording under the section 114(f) license; or (2) A transmitting organization that makes use of the exemption specified in section 114(d)(1)(C)(iv). These limitations on the section 112 license thus appear to present a dilemma for the broadcasters. Namely, how do they make the necessary ephemeral recordings incident to streaming nonsubscription broadcast transmissions over the Internet if they cannot take advantage of the statutory license in section 112? For this reason, RIAA suggests that Congress did not intend to exempt nonsubscription broadcast transmissions that are retransmitted over the Internet under the general exemption for broadcast transmissions set forth in section 114(d)(1)(A). Otherwise, Congress would have made provisions for the making of the necessary ephemeral recordings used in these transmissions.

Proposed Rule and Comments

The foregoing discussion has been presented solely for the purpose of stating the arguments that have been made to the Office in support of the request to conduct this rulemaking. While the Office has made no determination on the merits of the arguments put forth by RIAA in its petition, the Office acknowledges that there appears to be a need to resolve the questions surrounding the applicability of the section 114(d)(1)(A) exemption to the activities of a broadcaster when it makes a public performance of a sound recording by means of a digital audio transmission.

The Copyright Office does not foresee any need to amend its current rule defining the term "Service," 37 CFR 201.35(b)(2), in the event that a broadcast transmission is found to fall within the scope of the section 114(d)(1) exemptions. On the other hand, if the Office decides that transmissions of broadcast signals over a digital communications network, such as the Internet, are not exempt from copyright liability under section 114(d)(1)(A) of the Copyright Act, then it proposes amending the rule as set forth in this notice.

All interested parties are requested to file comments and replies with the Copyright Office in accordance with the information set forth in this document. Comments are invited, first, on whether the Office should address this issue in a rulemaking and, second, on whether the Office should adopt the regulatory language set forth in the notice or some other regulatory language in its place. The Copyright Office has posted the RIAA petition to its website (http://www.loc.gov/copyright/CARP/RIAApetition.pdf) in order to facilitate the dissemination of the information presented by RIAA in its petition.

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Statutory Authority

The Copyright Office initiates this proceeding under its authority to establish regulations for the administration of its functions and duties under title 17. 17 U.S.C. 702. The Office exercises its authority under section 702 when it is necessary "to interpret the statute in accordance with Congress' intentions and framework and, where Congress is silent, to provide reasonable and

[2] A transmitting organization that makes transmissions under the section 114(f) license may also make an ephemeral recording, under a separate statutory license, for the purpose of making the digital audio transmissions. 17 U.S.C. 112(e).

permissible interpretations of the statute." 57 FR 3284, 3292 (January 29, 1992); see also 63 FR 3685, 3686 (January 26, 1998) (invoking section 702 authority to determine whether a local over-the-air broadcast signal may be retransmitted into the local market area under the provisions of the section 119 statutory license).

List of Subjects in 37 CFR Part 201

Copyright.

In consideration of the foregoing, it is proposed that part 201 of 37 CFR be amended as follows:

PART 201--GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Section 201.35(b)(2) is revised to read as follows:

§201.35 Initial Notice of Digital Transmission of Sound Recordings under Statutory License.

* * * * *

(b) * * *

(1) * * *

(2) A *Service* is an entity engaged in the digital transmission of sound recordings, pursuant to section 114(f) of title 17 of the United States Code, including, but not limited to, any entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, and provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. 114(d)(2).

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Dated: March 10, 2000.

David O. Carson,

General Counsel.

[FR Doc. 00-6419 Filed 3-15-00; 8:45 am]

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